Supreme Court, U.S
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No 10-724 NOV 24 2010

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In The

Supreme Court of the United States

JANET HATMAKER,

Petitioner,

versus

MEMORIAL MEDICAL CENTER,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Crawford v Metro Gov't of Nashville & Davidson County*, 552 U S 1162 (2008), this Court granted certiorari to consider the following question

> Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment? *Crawford v Metro Gov't of Nashville & Davidson County*, 2006 U S Briefs 1595 (2007)

Unfortunately, in reaching its ultimate holding in this case, the Court found that "[b]ecause Crawford's conduct is covered by the opposition clause, we do not reach her argument that the Sixth Circuit misread the participation clause as well " *Crawford v Metro Gov't of Nashville & Davidson County*, 129 S Ct 846, 853 (2009)

In this petition, Janet Hatmaker asks the Court to look at this same issue again and to consider the following questions

1 Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of gender discrimination?

2 Can an employer lawfully terminate an employee who it feels has exercised "bad judgment" during the course of an internal investigation of gender discrimination?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming summary judgment is reported at 619 F.3d 741. App. 1-13. The opinion of the District Court (C.D. Ill.) granting summary judgment is unreported. App. 15-46.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its opinion on August 30, 2010. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

INTRODUCTION

In *Crawford v Metro Gov't of Nashville & Davidson County*, 552 U S 1162 (2008), this Court granted certiorari to address the question of whether an employer's internal investigation constituted an "investigation, proceeding, or hearing" under the participation prong of Title VII's anti-retaliation provision 42 U S C § 2003-3(a)(2) Ultimately, however, the Court decided that case on other grounds and left that issue for another day Janet Hatmaker is asking this Court to consider this question again

The importance of these protections to employees is axiomatic More importantly, these protections are vital if the remedial scheme of Title VII is going to be successful This Court has repeatedly stressed that Title VII is designed to allow employers to root out discrimination internally If this is going to be successful employees must feel comfortable in knowing that they will not be the victims of retribution for bringing forward their concerns

STATEMENT OF THE CASE

A. Proceedings in the Lower Courts

The complaint in this case raised a federal question under Title VII Accordingly, the District Court had jurisdiction under 28 U S C § 1331 Janet Hatmaker [hereafter "Hatmaker"] is requesting that this Court review an order that led to the entry of judgment against her entered by the District Court

that was ultimately affirmed by the Court of Appeals An order was entered by the District Court on July 31, 2009, which granted judgment in favor of the Defendant Thereafter, on August 30, 2010, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court

B. Facts Material to the Consideration of the Questions

From July 12, 1999, through December 27, 2006, Rev Elizabeth Hawkins served as the Director of Pastoral Care at the Memorial Medical Center [hereafter "MMC"] in Springfield, Illinois In September of 2006, Rev Hawkins took a medical related leave of absence from her position at MMC Rev Hawkins did not recover from her medical condition and died on December 27, 2006

At about the time that Rev Hawkins took her leave of absence, MMC temporarily assigned Rev Greg Stafford as its Acting Director of Pastoral Care [1] On February 19, 2007, Forrest G Hester, MMC's Sr Vice President and chief people officer, held a meeting with the employees of MMC's Pastoral Care Department [2] Hester was the person responsible for selecting the person who would fill the vacancy created by

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[1] Rev Stafford had commenced his employment with MMC as a staff chaplain on December 5, 2005

[2] Mr Hester, who assumed this job in April 2006, had supervisory responsibility for MMC's pastoral care department

Rev Hawkins' death During the course of this meeting, Mr Hester told the employees that they were going to begin a search for the new Director of the Department and told them that he would like to hear their thoughts During this meeting Mr Hester indicated that Rev Stafford was interested in the position Hatmaker attended this meeting

On February 25, 2007, Hatmaker took Hester up on his offer to share her opinions about the search for a new Director At the time, Hatmaker was the most senior member of the chaplain staff and felt that it was important to share her views regarding Rev Stafford Hatmaker wrote an e-mail to Mr Hester in which she indicated that she wanted to share some of her "observations and concerns about Rev Stafford's leadership abilities" Mr Hester responded by writing

> Hi Janet and thank you for sharing your observations They are important to me The outpouring of assistance as we think this matter through is very helpful Let me know if you have more thoughts as time goes on / Woody

On March 6, 2007, Hatmaker was working and had an early morning meeting with Rev Stafford, Rev Julie Hoving and another staff chaplain Hatmaker felt as though Rev Stafford was not as professional as he should have been in this meeting Hatmaker wrote an e-mail to Mr Hester that same day indicating that she had some "discomfort with [Rev Stafford], in a leadership role" Hatmaker

explained that the reason she wrote the e-mail was because "I thought in that [Mr Hester] had asked for feedback, that I wanted to be as conscious about giving him feedback as I could be "

Rev Stafford was informed that he had been selected to permanently fill Rev Hawkins' position on March 11, 2007 On March 26, 2007, Mr Hester wrote a letter to the MMC pastoral care staff to advise them that Rev Stafford was being named the Director

On March 30, 2007, Hatmaker wrote an e-mail to Rev Stafford stating

> Dear Greg
>
> I received the letter from Woody [Mr Hester], announcing your official position as Director of Pastoral Care Congratulations! It must have felt very affirming to have so many in the institution and community support you and your work at MMC
>
> May your leadership continue to grow and expand in spiritually deepening ways as you receive the "staff" of leadership and the mantle of blessing I will support you in the ways I can be most helpful I celebrate you in your new official role as Director Namaste, Janet

After Rev Stafford was named as the Director, Hatmaker spoke with a full-time staff chaplain, Julie Hoving, about his appointment Rev Hoving told Hatmaker that she felt as though the concerns the staff had about Rev Stafford had not been taken into

consideration by Mr Hester Hatmaker did not necessarily disagree In fact, she was troubled by the fact that Mr Hester had told her that the vacancy would be posted in professional publications but was not Hatmaker began hearing from other female staff about concerns that they had about Rev Stafford's appointment These women included Sister Anna Marie Mehigan, Julie Blythe and Dawn Victor

The comments from Rev Hoving and others concerned Hatmaker She herself had previously articulated some concerns, however, she was beginning to hear from a significant number of the women on staff about concerns that they held regarding Rev Stafford These concerns were buttressed by two different incidents Hatmaker had with Rev Stafford During an on-call meeting, Rev Stafford made the comment to her that "I have been divorced twice, I don't do women well " At a later meeting, Rev Stafford repeated the comment that he "didn't do women well" to Hatmaker

Hatmaker was also told of an incident that occurred between Rev Stafford and a 78-year old nun, Sister Anna Marie Mehigan Hatmaker explained that Sister Anna Marie had complained to her about statements Rev Stafford had made to her about the importance that the men's restroom played at MMC

> Then she said, and his example to me of what teamwork is that Bob Clark CEO, Ed Curtis at that time I think vice president, and he used the same bathroom That it didn't matter that one was CEO, and that he

was Director He used this bathroom metaphor to describe to her what teamwork was She told me about that She said can you believe – I mean she was stunned that was his example of teamwork

On April 30, 2007, Hatmaker sent an e-mail to Mr Hester concerning Rev Stafford The e-mail highlighted the following concerns

- I continue to have question marks about his [Rev Stafford's] leadership in relationship to women that I want to address with you
- Granted, most of visiting clergy and MMC OC [on call] chaplains at this moment in time are male, but that does not dismiss the issue of gender as it relates to Greg and his relationships to staff, as well as future appointments in the PC department Indeed, since his coming to MMC in his role as staff chaplain approximately 18 months ago, I have heard from several female clergy at both St John's and MMC along with female OC chaplains at MMC about their discomfort with Greg
- More immediately, I am concerned about how Greg's seeming (perhaps unconscious) diminished view of same age or younger women (he seems to do better with older women) will affect staffing in the Pastoral Care Dept Indeed, I have concerns for your only female staff Chaplain, Rev

> Julie Hoving, as well as the department's search for another staff chaplain

Upon receiving the e-mail from Hatmaker, Mr Hester requested that an internal EEO investigation be conducted Hester explained his rationale for requesting the investigation

> The letter raised concerns, in my mind, because Janet referenced gender issues and I felt it was important for us to rule out any kind of hostile work environment issue that might exist because the letter seemed to me to suggest that that could be the case

Mr Hester forwarded Hatmaker's e-mail to two individuals who were responsible for investigating discrimination complaints, Angela Nguyen and Anita Lengacher In his e-mail, Hester wrote

> Confidential I would like for one of you to follow up on this but I want to talk to you first Please see me & thanks!/Woody

In addition to contacting the EEO investigators, Mr Hester also contacted Rev Stafford Mr Hester advised Rev Stafford that Hatmaker had made some complaints about him concerning "gender issues in the department"[3] Rev Stafford responded to these

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[3] Mr Hester could not recall when, specifically, he spoke with Rev Stafford The documents, however, make it clear that it was fairly quickly after he received Hatmaker's e-mail Her e-mail was dated April 30, 2007, at 4 37 p m Rev Stafford composed a lengthy e-mail to Mr Hester in response to the allegations less than four hours later

complaints shortly thereafter In an e-mail later that same evening, Rev Stafford defended himself and indicated that Hatmaker should be disciplined for her actions He wrote that "[t]hese unfounded suggestions made by Janet is [sic] unfortunate for her and is certainly disturbing to me I am hopeful this accusation will be dealt with accordingly and with the necessary corrective action There is absolutely no reason and certainly no evidence for Janet's comments concerning me" At the time he wrote the e-mail, Rev Stafford understood that he was being investigated

On either April 30th or May 1st, Mr Hester sent an e-mail to Hatmaker asking her to give him a call Hatmaker then responded with an e-mail to Mr Hester in which she wrote

> Woody,
>
> Upon receiving your phone request for me to talk with Anita Lengacher and actually leaving a phone message for her, I realize that all that I wish to communicate has been expressed in my letter to you If you wish to forward that to Anita feel free to do so Ultimately, my desire is for your highly focused oversight of Greg in the future in regard to the issues mentioned To give it any more time or attention is superfluous Again, thank you for registering my concerns Janet

After receiving Hatmaker's e-mail, Hester responded by stating "Janet I do want you to talk to Anita and then I want to talk to you too This is important"

After receiving this e-mail, Hatmaker responded as follows

> Woody, thanks for considering my input important However, without diminishing its value, I have already called Anita back with the same message I emailed to you If you and she consider it that important to meet face to face I am willing to do so, my main concern is about oversight
>
> As I age I realize that we all grow and change, my hope/concern is that Greg is on a path of insight that will not only help him professionally but for his own happiness That is where I would recommend that he have a spiritual director/counselor to help him deal with the issues (in my opinion) that I reference When I was a staff chaplain I had such a person in Ed Liddell to help me deal with my own shadow issues I wish that Greg had access to such spiritual mentorship as I did Perhaps Ed set such a high standard that I have problems accepting any less in a director Ultimately, at this point in time, I am concerned about the PC leadership at MMC and how that translates for PC staff I imagine Greg does very well with patients, families and male clergy, he is a very caring man My concern is about the bigger picture, especially as it concerns women

Mr Hester responded to this e-mail by telling Hatmaker "Understand but I do want you to meet with Anita and then with me Please arrange those meetings and thanks "

On May 7, 2007, Hatmaker met with Anita Lengacher During the course of that interview, Hatmaker expressed, amongst other statements, as follows

- Hatmaker explained that because of Rev Stafford's background she was concerned about his diminished view of women in ministry
- Rev John Berg told Hatmaker that it seems like Rev Stafford was creating a "good ole boys network "
- She explained the concerns raised by Sister Anna Marie regarding the mens bathroom comment made by Rev Stafford
- Hatmaker discussed the fact that on two separate occasions Rev Stafford had made the comment to her that "I don't do women well "

After meeting with Hatmaker, Ms Lengacher wrote a memo to Mr Hester In that memo, she included the following information

- JH feels that GS has gender problems with women JH indicated her reasoning includes GS "puts down" Elizabeth Hawkins, GS is a Southern Baptist and a "good ole boy" and therefore has inherent sexist attitudes due to the male dominated cultures that GS associates with

- JH states that JB indicated to her that she felt his sexism the minute she met GS
- HG is concerned about GS working with our mostly female population of nurses
- GS puts down women

After meeting with Ms Lengacher, Hatmaker sent her a follow-up e-mail that also went to Mr Hester In that e-mail, dated May 7, 2007, Hatmaker referenced

- Hatmaker explained her concern that women were not included at Memorial's funeral for Elizabeth Hawkins She stated "[w]hy, given Elizabeth's gender and title, were female clergy not collected for prayer and readings?"
- Hatmaker explained that Rev Stafford came from a tradition that excluded women from the clergy
- Hatmaker also compared the situation to the notorious incident involving Don Imus and the Rutgers women's basketball team Hatmaker stated "[t]here is a not so subtle threat that continues to dismiss women regardless of color "

Mr Hester reviewed both the meeting summary prepared by Ms Lengacher and Hatmaker's e-mail

Hester testified he was troubled by what he read Mr Hester explained

> Janet made reference to southern Baptists and also made reference in her e-mail to the Catholic faith and the Jewish faith indicating that there were gender concerns among members of those two faiths She also made references to Don Imus and Al Sharpton and Jesse Jackson, and she questioned the reason why there were not female clergy selected for prayer and readings at Elizabeth's funeral And all of these together caused me to conclude that Janet had a lot of personal concerns and opinions about gender issues

Mr Hester then sent an e-mail to Ms Lengacher instructing her to meet with Hatmaker and provide her with three messages

> Thanks Anita for agreeing to close the loop on this
>
> Three messages
>
> 1 We had to talk with you to make sure there was not "hostile work environment/ sexual harassment issue " We've reviewed all and are very glad there isn't
>
> 2 Greg is the designated department director and he has the full support of the leadership of the organization If you are uncomfortable working for Greg and for the department under Greg's leadership you should resign We would understand and accept that

> 3 You have expressed a lot of concerns about gender conflict in general and a lot of opinions about those as well You are entitled to your opinions but discussing them with others at work is inappropriate Do not discuss issues of gender conflict in the work place Do not attempt to speak for or represent concerns or opinions of others You are always welcome to come and see me, or if you prefer you can see Michelle Frye EAP is also available to you if needed

On May 11, 2007, Hatmaker was again asked to speak to Ms Lengacher During the course of that conversation, Ms Lengacher told Hatmaker

- It was not appropriate for Hatmaker to discuss "her gender issues related to Greg Stafford with other employees of Memorial"
- MMC expected her to consider whether it is appropriate for her employment status to continue with MMC,
- MMC determined that there was not a hostile work environment, sexual harassment or sexual discrimination,
- Future concerns were to be brought directly to Lengacher's attention,
- Hatmaker was not to have discussions with any other employees about their concerns about Rev Stafford

After the May 11, 2007 meeting with Ms Lengacher, Hatmaker wrote a final e-mail to Mr

Hester and Ms Lengacher In that e-mail, Hatmaker wrote that she appreciated the fact that they listened to her, however, she indicated that "[t]his morning I felt like I was being silenced, dismissed and encouraged to get with the program As my anger diminishes, I feel sad "

Hester decided to suspend Hatmaker for a period of thirty days for her to reflect upon whether she truly wanted to be at Memorial According to Hester's deposition

> A At some point we asked Janet to take 30 days to consider her feelings and her position with Memorial, and we recommended that she seek employee assistance through what we call EAP because I felt that a counselor at EAP would be very beneficial to her in sorting out her feelings about the department and Greg Stafford in the context of all that she had described in her e-mail
>
> Q Was it also – That 30 days, was that time she was not to be working at Memorial?
>
> A Yes
>
> Q And what made you decide that she should not work at Memorial during that time frame?
>
> A I was actually extending a courtesy to Janet based upon her long tenure[4] with

[4] Hatmaker had been employed by Memorial since 1989

> Memorial and my high regard for her as a person because I wanted to give her every opportunity to be successful And so it was my hope that during the 30-day period with appropriate counseling she would be able to put these issues behind her [Hester deposition, p 52-53]

On May 15, 2007, Hatmaker received a telephone call from Anita Lengacher at approximately 9 00 a m Ms Lengacher told Hatmaker that they were not allowing her to work for a period of thirty days Ms Lengacher then told her that they thought she had some "anger issues" and it would be helpful for her to contact MMC's EAP program Hatmaker asked for more information and was told that MMC felt "you need time to think through whether you want to be in our Pastoral Care Department " Ms Lengacher then instructed Hatmaker to call her back in thirty days

Thirty days after the May 15th conversation, Hatmaker called Ms Lengacher Hatmaker advised her that, as instructed, she was contacting her to discuss a meeting about her return to MMC At that time, a meeting was scheduled for a few days later The day after her conversation with Ms Lengacher, Hatmaker received a telephone call from Mr Hester During the course of that short conversation Mr Hester told her that her services would no longer be needed by MMC Mr Hester explained that it was necessary "for the comfort of all concerned "

REASONS FOR GRANTING THE WRIT

I. This case presents a question of importance as it relates to the administration of retaliation claims under Title VII

In accordance with the Eleventh Circuit's holding in *EEOC v Total Systems Services, Inc*, 221 F3d 1171 (11th Cir 2000), the Seventh Circuit has concluded that the "participation" clause of Section 704(a) does not provide any protection to an employee who participates in a purely internal investigation, even if the employee is compelled to participate by her employer The "participation" clause of Section 704(a) makes it unlawful to retaliate against someone who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" 42 U S C § 2003-3(a)(2) The question of whether the protections against retaliation extend to an employee who participates in a purely internal investigation is significant to landscape of Title VII law [5]

This Court has repeatedly stressed that Title VII is remedial and that if it is to be successful employers must develop internal mechanisms to weed out

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[5] The importance of this question would appear to have been recognized in this court when it granted the writ in *Crawford*

discrimination For example, in *McKennon v Nashville Banner Publishing Company,* 513 U S 352, 358, 115 S Ct 879, 884 (1995), this Court described the fundamental purpose of Title VII as "the elimination of discrimination in the workplace" and went on to explain

> Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination *Id* (*citing Albermarle Paper Co v Moody*, 422 U S 405, 417-418, 95 S Ct 2362, 2371-72 (1975))

This Court has gone further and has essentially interpreted Title VII to impose strict liability on an employer for a supervisor's discriminatory harassment, subject to an affirmative defense designed "to recognize the employer's affirmative obligation to prevent violations and give credit to employers who make reasonable efforts to discharge their duty" *Faragher v City of Boca Raton*, 524 U S 775, 806 (1998) For an employer to satisfy this affirmative defense, it must show that it has developed a "proven, effective mechanism for reporting and resolving" discrimination *Faragher*, 524 U S at 806 *See also* 29 C F R § 1604 11(f) (cautioning employers to "take all steps necessary to prevent sexual harassment from occurring")

Essentially, this Court has consistently recognized that in order for Title VII to be effective, aggrieved employees must be willing to come forward to discuss their concerns openly Undoubtedly, the most effective mechanism for doing so is an internal grievance procedure If the truly remedial nature of Title VII is to be fully realized, an employee must feel secure that by coming forward they will not suffer any adverse consequences

The EEOC has specifically and consistently recognized the importance of protecting an employee who participates in a purely internal investigation

> In the Commission's view, when an employer initiates an internal investigation of alleged discrimination in the workplace, an employee who is invited (or required) to cooperate with the inquiry has an objectively reasonable belief that, by providing relevant information to the designated investigators, she is opposing a practice made unlawful by Title VII 2 EEOC Compliance Manual § 1-II(A)(5), n 41 (1998) *See also Cardenas v Massey*, 269 F 3d 251, 263 (3rd Cir 2001), *Evans v Houston*, 246 F 3d 344, 352-353 (5th Cir 2001)

The EEOC has further stated

> Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII The

> very fact that the employer has initiated an investigation of alleged discrimination is sufficient to demonstrate the "objective reasonableness" of the employee's belief that, by providing information relevant to the inquiry, she is opposing an employment practice made unlawful by Title VII *Id*

The Commission also insists that an employee who cooperates in an internal investigation is protected by the participation clause of section 704(a)

> Participation means taking part in an employment discrimination proceeding Examples of participation include [c]ooperating with an internal investigation of alleged discriminatory practices, or [s]erving as a witness in an EEO investigation

This Court recognizes that the only way that discrimination can be effectively rooted out of the workplace is when employees and employers work collectively This goal can only be achieved if an employee feels as though they are immune from retribution if they come forward and share their concerns with their employer

The Seventh Circuit's decision in this case and the Eleventh Circuit's decision in *Total Systems Services*, are inconsistent with the broader remedial goal of Title VII The end result is that employees will not feel comfortable coming forward with their concerns and they will remain silent for fear of retribution As such, the conclusion reached by the Seventh

Circuit serves to frustrate rather than further the remedial goals of Title VII

II. The Seventh Circuit's decision is inconsistent with at least one other circuit

The Seventh Circuit's decision is clearly at odds with the EEOC's interpretation of the participation clause It is also at odds with the Ninth Circuit and holdings out of both the Fifth and Eighth Circuits as well The Ninth Circuit addressed a similar issue in *Hashimoto v Dalton*, 118 F 3d 671, 679 (9th Cir 1997) In *Hashimoto*, the plaintiff contacted an EEO counselor and complained that she was being evaluated based upon work that was not her responsibility The EEO counselor advised her of her right to file a discrimination complaint but the plaintiff responded that she "did not really believe that this is a discriminatory complaint" *Id* A few months later, the plaintiff began to feel as though she was being retaliated against The District Court concluded that this was not protected activity The Ninth Circuit, examining the breadth of the participation clause, reversed and found that the actions of the plaintiff were entitled to protection *Id* at 680, *see also Bell v Gonzales*, 398 F Supp 2d 78, 94-95 (D D C 2005)

In *Scott v County of Ramsey*, 180 F 3d 913 (8th Cir 1999), the Eighth Circuit upheld a jury determination that found that the plaintiff had been retaliated against based upon his participation in an internal sexual harassment investigation "Scott was

ordered to give a statement in an internal investigation regarding a sexual harassment claim that had been filed by another deputy" 180 F 3d at 916 "Scott gave a recorded statement that confirmed the inappropriate comments [complained of, and] stated he was sure that [a named supervisor] was aware of the behavior" *Id* Scott alleged, and the jury found, that he was "terminated in retaliation for participating in a protected activity" *Id* The Eighth Circuit upheld that finding

In *Evans v City of Houston*, 246 F 3d 344 (5th Cir 2001), the plaintiff alleged that he had been retaliated against for testifying at the grievance hearing of another city employee The Defendant argued that "[i]nternal grievance procedures are not 'protected activities' under Title VII" The Fifth Circuit rejected this argument 246 F 3d at 352 n 7

A clear resolution from this Court is necessary to resolve the inconsistent treatment this issue has received by the lower courts

III. There is a conflict amongst the circuits as to what actions by an employee are protected during the course of a proceeding

The Seventh Circuit concluded that Hatmaker was not terminated because she participated in a proceeding protected under Title VII Rather, the Court concluded that "[s]he was fired because of comments she made that demonstrated bad judgment and a preoccupation with superficial characteristics of

her new boss, and for harping on irrelevant sensitive issues of religion and race" (App 7) Without commenting on the accuracy of the assessment of Hatmaker's actions, the Seventh Circuit's opinion creates a very large opening for allowing an employer to retaliate against an employee should the employer arbitrarily conclude that the employee exercised "bad judgment" during the course of an investigation

In *Glover v South Carolina Law Enforcement Division*, 170 F 3d 411 (4th Cir 1999), the Fourth Circuit addressed the specific question of whether a plaintiff was protected when their participation included comments that were not appropriate That case centered around deposition testimony that the plaintiff had offered that included answers that were not responsive to questions that had been asked The District Court granted summary judgment finding, much like the Seventh Circuit here, that the plaintiff's answers in her depositions were "unresponsive, uncompelled, and gratuitous" and thus outside of the scope of the protections afforded under the participation clause *Id* at 413 The Fourth Circuit reversed and found that the plain language of the statute mandated that the deposition testimony be protected The Court noted that "[t]estifying in a Title VII proceeding is plainly protected participation – the clause neither requires nor allows further balancing" *Id* at 415 [6] The Fourth Circuit concluded by holding

[6] It is ironic that the Seventh Circuit would expand the language of the participation clause to allow for an assessment

(Continued on following page)

that "Congress has determined that some irrelevant and even provocative testimony must be immunized so that Title VII proceedings will not be chilled" *Id* at 414

Throughout its opinion, the Seventh Circuit clearly recognized that there existed a split of authority on this particular issue The Court criticized the logic of the Fifth Circuit in *Pettway v American Cast Iron Pipe Co*, 411 F 2d 998, 1007 (5th Cir 1969), of the Sixth Circuit in *Booker v Brown & Williamson Tobacco Co*, 879 F 2d 1304, 1312 (6th Cir 1989), and the Eighth Circuit's opinion in *Womack v Munson*, 619 F 2d 1292, 1298 (8th Cir 1980)

Hatmaker is requesting that this Court resolve this split of authority amongst the Circuit Courts

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of whether an employee's comments are reasonable but insist upon a strict interpretation of the same clause when determining what constitutes a proceeding

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented in this Petition

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No 09-3002

JANET HATMAKER,

Plaintiff-Appellant,

v

MEMORIAL MEDICAL CENTER,

Defendant-Appellee

Appeal from the United States District Court
for the Central District of Illinois
No 07-3319 – **Jeanne E. Scott**, *Judge*

ARGUED MAY 24, 2010 – DECIDED AUGUST 30, 2010

Before EASTERBROOK, *Chief Judge*, and POSNER and EVANS, *Circuit Judges*

POSNER, *Circuit Judge* Janet Hatmaker, a part-time chaplain employed by Memorial Medical Center, a hospital in Springfield, Illinois, was fired and brought this suit against the hospital, charging a violation of 42 U S C § 2000e-3(a) That is the provision of Title VII that forbids an employer "to discriminate against any individual because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a

charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]" Hatmaker claims to have been fired because she "participated in an investigation under" Title VII She also relies on the opposition clause, but places less emphasis on it, we discuss it briefly at the end of this opinion The district judge granted summary judgment for the hospital

Oddly, when one considers Hatmaker's emphasis in this court on the participation clause, it went unmentioned in her complaint The district court refused to allow her to raise it in her response to Memorial's motion for summary judgment, holding the omission to mention the clause in her complaint a waiver That ruling was mistaken Although *Bell Atlantic Corp v Twombly,* 550 U S 544 (2007), and *Ashcroft v Iqbal,* 129 S Ct 1937 (2009), require that a complaint in federal court allege facts sufficient to show that the case is plausible, see, e g , *Phillips v County of Allegheny,* 515 F 3d 224, 232 (3d Cir 2008), they do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories See *Aaron v Mahl,* 550 F 3d 659, 665-66 (7th Cir 2008), *O'Grady v Village of Libertyville,* 304 F 3d 719, 723 (7th Cir 2002) Even citing the wrong statute needn't be a fatal mistake, provided the error is corrected in response to the defendant's motion for summary judgment and the defendant is not harmed by the delay in correction *Ryan v Illinois Dept of Children & Family Services,* 185 F 3d 751, 764 (7th Cir 1999) Memorial was not harmed

When the director of Memorial's chaplain staff (see Memorial Hospital, "Hospital Guide – Pastoral Care," www memorialmedical com/Guide/PastoralCare/ (visited Aug 5, 2010)) took a medical leave of absence, which turned out to be only a short time before she died, the hospital appointed Reverend Greg Stafford acting director After the director's death, the hospital announced that it was searching for a permanent replacement and that Stafford was a candidate Forrest Hester, Memorial's Chief Human Resources Officer, who was in charge of the search and would make the appointment, solicited the members of the chaplain staff for their opinion of Stafford In an email to Hester, Hatmaker expressed concern "about Greg's presentation of himself in public and in representing our department I have observed him speak on several formal occasions and was disappointed in his remarks and appropriateness He appeared to be both uncomfortable with himself and inexperienced in that role If he is chosen to lead our department I would recommend some mentoring in this area " In a follow-up email she expressed "discomfort with Greg in a leadership role " She said "he is trying so much to be a 'good ole boy' and friend that he sacrifices dignity and leadership in exchange for popularity He seems to major in small talk In short, he does not strike me as a spiritual statesman "

Stafford was appointed director Hatmaker was critical that the opening for director had not been posted in "professional publications" before the

appointment was made, as Hester had suggested would be done Apparently some other female members of the chaplain staff were disappointed with the appointment Their reservations were reinforced, according to Hatmaker, by Stafford's saying in the presence of female staff members that "I have been divorced twice, I don't do women well" and that "what teamwork was" was illustrated by his being permitted to use the same bathroom as the CEO and a vice president of Memorial even though they were his superiors

Hatmaker emailed Hester that she "continue[d] to have question marks about Greg's leadership in relationship to women," that other women had expressed "their discomfort" with him, and that his "seeming (perhaps unconscious) diminished view of same age or younger women (he seems to do better with older women) will affect staffing in the [chaplain division]" She also wrote "On a personal level, in several conversations I have had with him he quickly referenced his 2 divorces and his distrust/discomfort with women, however, his obvious attraction to/fear of women raises many questions for me about whether he has addressed or been addressed by this significant issue in his Clinical Pastoral Education" She expressed concern that he had been certified by the College of Chaplains only provisionally and said "I can't help but wonder if his lack of self knowledge in regard to women and intimacy/partnership is part of his provisional acceptance into this professional organization" She added "due to my concern I plan

to send copy letters to both Martha Sumner on the Board of Directors and [CEO] Ed Curtis, as well "

Upon receipt of this alarming email, Hester decided to start an investigation, he thought it "important to rule out any kind of hostile work environment issue that might exist because the [email] seemed to me to suggest that that could be the case " He forwarded Hatmaker's email to two employees responsible for investigating complaints of discrimination and also told Stafford that she had complained about him Stafford denied that he had created a hostile work environment

Hester wanted Hatmaker to speak to the investigator She was reluctant She told Hester that "my desire is for your highly focused oversight of Greg in the future in regard to the issues mentioned To give it any more time or attention is superfluous " And further that "Greg is on a path of insight that will not only help him professionally but for his own happiness That is where I would recommend that he have a spiritual director/counselor to help him deal with the issues that I reference " But Hester insisted that she be interviewed by the investigator and she yielded The investigator reported her as saying in the interview that Stafford "puts down women" – that he was "a Southern Baptist and a 'good ole boy' and therefore has inherent sexist attitudes " She said that in his shoes she would have sought therapy In a follow-up email to the investigator she said that the fact that a rabbi and a priest had written "raving reviews for Greg as director" was no surprise because

"they both come from traditions from which female clergy are excluded " She further expressed concern that no female clerics had been asked to speak at a memorial service for Stafford's predecessor, a woman who Hatmaker thought would have wanted female clerics to share the podium She compared this omission to the "recent Don Imus debacle in regard to the Rutger's WOMEN's basketball team" (Imus had called the players on Rutgers' women's basketball team "nappy-headed hos"), when "instead of black female clergy being interviewed or asked to speak to the issue, Al Sharpton and Jesse Jackson were the chosen male spokespeople "

Hester and the investigator concluded that Stafford had not created a hostile work environment in the chaplain division and Hester was disturbed by Hatmaker's gratuitous references to Jews, Catholics, Southern Baptists, Don Imus, Al Sharpton, and Jesse Jackson He instructed the investigator to inform her that "if you are uncomfortable working for Greg and for the department under Greg's leadership you should resign" and that she was "to have no discussions with other employees regarding their perception or problems with Greg " She responded by emailing Hester and the investigator that she would "direct further concerns and/or communications to Greg directly with the hope that he will seek professional guidance " The email went on and on, indicating her preoccupation with Stafford Hester suspended her for 30 days to give her a chance to express willingness to put her feelings about Stafford behind her When

nothing happened by the end of that period he fired her, telling her it was necessary "for the comfort of all concerned."

Her communications to Hester and to the investigator constituted participation in a purely internal investigation of possible sex discrimination, and even if an internal investigation is an "investigation" within the meaning of the provision of Title VII quoted at the outset of this opinion (a question to which we'll return) she was not fired for participating in it. She was fired because of comments she made that demonstrated bad judgment and a preoccupation with superficial characteristics of her new boss, and for harping on irrelevant sensitive issues of religion and race.

An employer is forbidden to discriminate against an employee who participates in an investigation of employment discrimination. But participation doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination. *Scruggs v. Garst Seed*, 587 F.3d 832, 838 (7th Cir. 2009); *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 553-54 (2d Cir. 2010); *Gaujacq v. EDF, Inc.*, 601 F.3d 565, 577-78 (D.C. Cir. 2010). This includes making frivolous accusations, or accusations grounded in prejudice. For it "cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for

defaming other employees or the employer through their complaint when the allegations are without any basis in fact" *Gilooly v Missouri Dept of Health & Senior Services,* 421 F 3d 734, 740 (8th Cir 2005) As further explained in *Mattson v Caterpillar, Inc* , 359 F 3d 885, 890-91 (7th Cir 2004), "Title VII was not designed to 'arm employees with a tactical coercive weapon' under which employees can make baseless claims simply to 'advance their own retaliatory motives and strategies' Were we to adopt a different standard, an employee could immunize his unreasonable and malicious internal complaints simply by filing a discrimination complaint with a government agency Similarly, an employee could assure himself unlimited tenure by filing continuous complaints with the government agency if he fears that his employer will discover his duplicitous behavior at the workplace This is not an unrealistic parade of horribles – it is, after all, what may have occurred in this case Mattson filed an internal complaint that was baseless Had Caterpillar immediately discovered the evidence that proved Mattson acted maliciously, both parties agree that Mattson could have been discharged at that time However, Mattson then filed the charge with the IDHR and EEOC and now argues that he cannot be terminated even though Caterpillar discovered that both charges were filed maliciously If we were to adopt Mattson's arguments, it would encourage the abuse of Title VII and the proceedings that it established"

Some courts disagree They think that even defamatory and malicious accusations made in the course of an EEOC investigation cannot be a lawful ground for discipline *Pettway v American Cast Iron Pipe Co*, 411 F 2d 998, 1007 (5th Cir 1969), *Booker v Brown & Williamson Tobacco Co*, 879 F 2d 1304, 1312 (6th Cir 1989), *Womack v Munson*, 619 F 2d 1292, 1298 (8th Cir 1980) (but in so holding, *Womack* is inconsistent with the Eighth Circuit's later decision in *Gilooly*) To these courts "participated in any manner" in an investigation seems to mean "participated by any and all means" rather than participated in any *capacity*, whether formally or informally, whether as complainant or as a witness, and at whatever stage of the investigation But these courts can't believe that forging documents and coercing witnesses to give false testimony are protected conduct And if they don't believe that, why do they think that lying is protected? Lying in an internal investigation is disruptive of work-place discipline and in tension with the requirement that opposition to an unlawful practice (the making of which is protected by the first clause of section 2000e-3, see *Crawford v Metropolitan Govt of Nashville & Davidson County*, 129 S Ct 846, 850-51 (2009)) be based on an honest and reasonable belief that the employer may be violating Title VII *Magyar v Saint Joseph Regional Medical Center*, 544 F 3d 766, 771 (7th Cir 2008), *Fine v Ryan Int'l Airlines*, 305 F 3d 746, 752-53 (7th Cir 2002), *Manoharan v Columbia University College of Physicians & Surgeons*, 842 F 2d 590, 593 (2d Cir 1988)

Even *Pettway,* the leading case holding that a participant can't be fired for misconduct in the course of an investigation, shrinks from embracing the full implications of its holding by confining it to cases in which the participant makes accusations that shorn of their malicious and defamatory elements state a claim of discrimination 411 F 2d at 1007, see also *Womack v Munson, supra,* 619 F 2d at 1298 n 10 That condition is not satisfied in this case It is not a case in which the complaint has a valid core and there is merely an unsavory wrapping None of the statements that Hatmaker made to the investigator and Hester, such as her complaints about Stafford's reference to his divorces or to the fact that his boss lets him use the boss's bathroom, was suggestive of sex discrimination, and so they didn't begin to trigger the retaliation provisions of Title VII They were complaints about an awkward boss who the plaintiff thought might become a problem in the future Her emails do not accuse him of discrimination and her deposition states that she was just trying to head off the possible future emergence of a hostile work environment When she said that Stafford was "a Southern Baptist and a 'good ole boy' and *therefore* has *inherent* sexist attitudes" (emphasis added), she was trafficking in stereotypes by attributing "sexist attitudes" to assumed tenets of his religion or to attitudes of his coreligionists If he shared such attitudes – buried deep and visible only to the penetrating gaze of Janet Hatmaker – there is no evidence that he ever expressed or acted on them

There is, moreover, an independent ground on which the district court must be affirmed The "investigation" to which section 2000e-3 refers does not include an investigation by the employer, as distinct from one by an official body authorized to enforce Title VII (A possible exception, discussed below, is irrelevant to this case) The participation clause prohibits retaliation against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII A purely internal investigation does not involve a "charge," or testimony, and neither is it a "proceeding" or a "hearing " To bring an internal investigation within the scope of the clause we would have to rewrite the statute We therefore join the courts that interpret the participation clause as being limited to official investigations *EEOC v Total System Services, Inc* , 221 F 3d 1171, 1174 (11th Cir 2000), *Brower v Runyon,* 178 F 3d 1002, 1006 (8th Cir 1999), *Vasconcelos v Meese,* 907 F 2d 111, 113 (9th Cir 1990), contra, *Hashimoto v Dalton,* 118 F 3d 671, 679-80 (9th Cir 1997) We take no position on whether participation in an internal investigation begun *after* a charge is filed with the EEOC should be treated as participation in the official investigation, on the theory, embraced by some courts, that any fruits of the participant's activity are bound to feed into that investigation *Abbott v Crown Motor Co* , 348 F 3d 537, 543 (6th Cir 2003) As stated in *Clover v Total System Services, Inc* , 176 F 3d 1346, 1353 (11th Cir 1999), "an employer receiving a form notice of charge of discrimination knows that any evidence

it gathers after that point and submits to the EEOC will be considered by the EEOC as part of the EEOC investigation Though this is an indirect means of gathering evidence to investigate a charge of discrimination, the EEOC considers employer-submitted evidence on an equal footing with any evidence it gathers from other sources Because the information the employer gathers as part of its investigation in response to the notice of charge of discrimination will be utilized by the EEOC, it follows that an employee who participates in the employer's process of gathering such information is participating, in some manner, in the EEOC's investigation " That is not this case

It's not even clear that employees would benefit from the broadening of the statute urged by Hatmaker It might discourage internal investigations in cases such as this, in which a nonfrivolous charge was unlikely to emerge from nebulous suspicions voiced by a busy-body (In retrospect the employer might well have been spared this suit by taking Hatmaker's advice not to investigate Stafford's conduct) Such forbearance would burden the EEOC and the courts with employment disputes that could have been resolved amicably by an informal investigation by the employer There would also be formidable definitional difficulties Would *any* response, however perfunctory, to Hatmaker's emails have constituted an investigation? And what would count as "participation" in an informal internal investigation? Were the other women on the chaplain's staff

whose concerns Hatmaker relayed to Hester also participants in the investigation?

This is not a road we want to go down, more to the point, Congress has not built such a road

Hatmaker's opposition claim, to which we now turn, falls along with her participation claim Even when there is no investigation within the meaning of the statute, an employer is, as we know, forbidden to retaliate against an employee for opposing unlawful conduct But remember that opposition, to be protected by the statute, must be based on a good-faith (that is, honest) and reasonable belief that it is opposition to a statutory violation It would have been unreasonable for Hatmaker to entertain such a belief, and in any event she says that, as in *Mattson v Caterpillar, Inc , supra,* 359 F 3d at 889, she did not

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[LOGO]

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FINAL JUDGMENT

August 30, 2010

BEFORE FRANK H EASTERBROOK, Chief Judge
RICHARD A POSNER, Circuit Judge
TERENCE T EVANS, Circuit Judge

No 09-3002	JANET HATMAKER, Plaintiff-Appellant v MEMORIAL MEDICAL CENTER, Defendant-Appellee

Originating Case Information:
District Court No 3 07-cv-03319-JES-BGC Central District of Illinois District Judge Jeanne E Scott

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date

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IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS SPRINGFIELD DIVISION

JANET HATMAKER, Plaintiff,	)	
v	)	No 07-3319
MEMORIAL MEDICAL CENTER, Defendant	)	

OPINION

(Filed Jul 31, 2009)

JEANNE E SCOTT, U S District Judge

This matter is before the Court on Defendant Memorial Medical Center's Motion for Summary Judgment (d/e 19) Plaintiff Janet Hatmaker asserts that her former employer, Memorial Medical Center (Memorial), violated Title VII of the Civil Rights Act of 1964 [1] Specifically, Hatmaker's Complaint (d/e 1) alleges that she experienced unlawful discrimination based on her gender in violation of 42 U S C § 2000e-2(a) and that she was subjected to unlawful retaliation in violation of 42 U S C § 2000e-3 Memorial moves for summary judgment on each of Hatmaker's

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[1] Hatmaker also alleged claims against Memorial Health System, but those claims have been dismissed by stipulation *See Text Order, dated March 14, 2008*

claims For the reasons set forth below, Memorial's Motion for Summary Judgment is allowed

BACKGROUND

Memorial is a hospital located in Springfield, Illinois[2] Prior to June 18, 2007, Hatmaker was employed by Memorial Hatmaker's last position with Memorial was that of per diem chaplain, a position she held beginning August 23, 2001 The record indicates that Hatmaker held other chaplain positions with Memorial prior to August 2001 From July 1999 until December 27, 2006, Rev Elizabeth Hawkins served as Memorial's Director of Pastoral Care During that period, Rev Hawkins was Hatmaker's direct supervisor In September 2006, Rev Hawkins took a medical leave of absence from Memorial, due to a serious health condition Rev Hawkins died on December 27, 2006

At the time Rev Hawkins went on medical leave in September 2006, Memorial named Rev Greg Stafford as Acting Director of Pastoral Care At all relevant times, Memorial Senior Vice President Forrest G "Woody" Hester was Rev Stafford's supervisor On February 19, 2007, Hester convened a meeting of the employees of Memorial's Pastoral Care Department and announced that Memorial had

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[2] Unless otherwise noted, the information contained in this background section is taken from the facts deemed by both parties to be undisputed

begun the process of locating a new Director of Pastoral Care Hester also announced that Rev Stafford had expressed interest in becoming the Director of Pastoral Care

On February 25, 2007, Hatmaker emailed Hester regarding the meeting and the Director search *Motion for Summary Judgment*, Ex A, p 10 [3] Hatmaker wrote that she had served under the directorships of Roy Nash, Ed Liddell, Gary Sproat, and Elizabeth Hawkins and had been able to observe the leadership abilities of each Hatmaker wrote that she wanted to share some "observations and concerns about Greg's leadership abilities" in light of her prior interactions *Id* According to Hatmaker, during the time Rev Stafford had been serving as Acting Director, "he has done an excellent job as a communicator, facilitator and connector for all of the ministerial subsets operating out of [the Pastoral Care] department" *Id* Hatmaker further noted that Rev Stafford's "warmth and approachability has been a distinct asset and his eagerness to do his very best has been noticeable" *Id* Hatmaker deemed these characteristics to be "even more admirable given [Rev Stafford's] newness on staff" *Id* However, Hatmaker expressed concern "about Greg's presentation of

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[3] The Court will generally reference the exhibits by the page numbers assigned by the Court's electronic filing system However, after a deposition has been referenced and identified, the Court will use the deposition's internal page numbers to allow for more exact citation

himself in public and in representing our department" *Id* Specifically, Hatmaker noted that she had observed Rev Stafford speak on several formal occasions and "was disappointed in his remarks and appropriateness" *Id* According to Hatmaker, Rev Stafford appeared to be "uncomfortable with himself and inexperienced in that role" *Id* Hatmaker recommended "some mentoring in this area" should Rev Stafford be chosen as Director *Id*

Hester responded by sending Hatmaker the following email "Hi Janet and thank you for sharing your observations They are important to me The outpouring of assistance as we think this matter through is very helpful Let me know if you have more thoughts as time goes on /Woody" *Motion for Summary Judgment*, Ex A, p 11, *see also Motion for Summary Judgment*, p 3, Statement of Undisputed Material Fact No 16, *Plaintiff's Memorandum of Law in Opposition to Summary Judgment (Hatmaker's Opposition)*, p 2 (conceding Defendant's Statement of Undisputed Material Fact No 16)

On March 6, 2007, Hatmaker sent another email to Hester The record contains a true and accurate copy of this email, Bates stamped MMC014 *Motion for Summary Judgment*, Ex A, p 5, Request to Admit No 21, & p 11 Hatmaker wrote that she had been on-call the previous Sunday night and, on Monday, June 5, she had reported in before going off duty to three named individuals, including Rev Stafford According to Hatmaker, during the brief report time, she realized her continuing discomfort with Rev

Stafford in a leadership role Hatmaker reported as follows

> At the expense of sounding nit-picking, it feels to me like he is trying so much to be a "good ole boy" and friend that he sacrifices dignity and leadership in exchange for popularity There are no specifics in the content of our interchange that I can site [sic] but the feeling that I came away with is one of disappointment He seems to major in small talk, [sic] In short, he does not strike me as a spiritual statesman Although I was not personally as drawn to Roy Nash, Gary Sproat and Elizabeth Hawkins on a spiritual level as to Ed Liddell, I saw each of them as spiritual statesmen/woman in comparison They invited my respect in the area of leadership Greg does not I feel like he sees himself as the great entertainer
>
> Since I will be going out of town for several weeks following my next Sunday night (3/11) on-call coverage, I wanted to communicate with you about my observations and feelings before they become distant for whatever they are worth Thanks for welcoming our input

Id , p 11

On March 26, 2007, Hester issued a letter to Memorial's Pastoral Care staff, announcing that Rev Stafford had accepted the Director of Pastoral Care position Hester testified in his deposition that he chose Rev Stafford over other applicants for the

position based on a review of the candidates' background experience, credentials, relationships with the community of clergy, and relationships within Memorial On March 30, 2007, Hatmaker sent an email to Rev Stafford, congratulating him on his appointment and offering to support him in the ways she could be most helpful

On April 20, 2007, a meeting occurred between Hatmaker, Rev Stafford, and Brenda Edens, who was the head of the pain management team at Memorial Rev Stafford called the meeting Its purpose was to discuss Reiki therapy, a Japanese technique similar to touch therapy Hatmaker is trained and certified in Reiki When Rev Hawkins was Director of Pastoral Care, she required all of the staff chaplains to become certified in Reiki Hatmaker testified that, prior to Rev Stafford being hired as a chaplain, Hatmaker expressed discomfort to Rev Hawkins about male chaplains performing Reiki *Motion for Summary Judgment*, Ex C, p 1-36, *Deposition of Janet Hatmaker (Hatmaker Dep)*, p 15-16 Hatmaker also testified that, after he was hired, Rev Stafford expressed his discomfort with Reiki to her *Id* , p 16-17 With respect to the April 20, 2007, meeting, Hatmaker testified that Rev Stafford stated that he wanted to put Edens and Hatmaker in touch with one another because Rev Stafford was uncomfortable with Reiki Hatmaker characterized Rev Stafford's conduct at the meeting as "very complimentary" to her, "very gentlemanly," "very honoring of [Edens and Hatmaker]," and "very professional " *Id* , p 18-19

According to Hatmaker, Rev Stafford stayed at the meeting for approximately fifteen or twenty minutes, at which point he said he had another meeting and left Hatmaker testified that there was nothing inappropriate or objectionable about Rev Stafford's behavior at the April 20, 2007, meeting *Id* , p 19

On April 30, 2007, Hatmaker sent a lengthy email to Hester to share some concerns regarding Rev Stafford An accurate copy of the email is included in the record with the Bates stamp MMC019 *See Motion for Summary Judgment*, Ex A, p 5, Request to Admit No 28, & p 14-15 Hatmaker wrote that she was "stunned by the news of Greg's appointment" and "puzzled and troubled" when she read of the outpouring of support for Rev Stafford *Motion for Summary Judgment*, Ex A, p 14 She stated that she expected the search process to be "an exploration rather than the outcome of a voting campaign " *Id* Additionally, Hatmaker wrote as follows "Given my previous letters to you, I am sure it comes as no surprise that I had/have reservations " *Id* Hatmaker informed Hester that she continued "to have question marks about [Rev Stafford's] leadership in relationship to women " *Id*

Hatmaker wrote that, in the eighteen months since Rev Stafford began working as a staff chaplain at Memorial, several female clergy at Memorial and St John's Hospital, another local hospital, had expressed their discomfort with him to Hatmaker *Motion for Summary Judgment*, Ex A, p 14 Hatmaker reported that, in several conversations she had with

Rev Stafford, "he quickly referenced his 2 divorces and his distrust/discomfort with women" *Id* Hatmaker wrote that Rev Stafford's "obvious attraction to/fear of women raises many questions about whether he has addressed or been addressed by this significant issue in his Clinical Pastoral Education training" *Id* Hatmaker stated that she was puzzled as to why it was not noted that Rev Stafford was only provisionally certified in the College of Chaplains, despite eighteen years of experience in chaplaincy[4] She opined that Rev Stafford's "lack of self knowledge in regard to women and intimacy/partnership" could be part of his provisional certification *Id* Hatmaker characterized "the gender issue of particular importance" based on Rev Stafford's work with women in the Pastoral Care Department and with women nurses and caregivers at Memorial *Id*

Hatmaker also stated an immediate concern about how Rev Stafford's "seeming (perhaps unconcious [sic]) diminished view of same age or younger women will affect staffing in the Pastoral Care Dept" *Motion for Summary Judgment*, Ex A, p 14 Hatmaker conceded that Rev Stafford seemed "to do better with older women" *Id* Hatmaker noted specific concerns about the "only female staff chaplain, Rev Julie Hoving, as well as the department's search for another staff chaplain" *Id* Hatmaker stated her hope

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[4] Hatmaker noted her understanding that all previous Directors of Pastoral Care had been certified through this organization, with the possible exception of Rev Hawkins

that the new staff chaplain would be female, "as an appropriate compliment to the dept" *Id* Hatmaker closed her email as follows

> It is with these observations that I recommend your highly focused oversight of Greg in this area In case you wonder, I find Greg to be affable, capable and ambitious He is a fine man with noble aims and a magnetic personality However it is the question marks I site [sic] above along with observations from my previous letters to you that raise red flags for me, I would feel irresponsible if I did not share them with you Thanks for hearing me out

Id , p 14-15

Hatmaker testified that, on two occasions, she heard Rev Stafford say that he had been divorced twice, and did not "do women well" *Hatmaker Dep* , p 49-50 Hatmaker also explained in her deposition that, prior to April 30, 2007, she had discussions regarding Rev Stafford with five women, namely Julie Blythe, Julie Hoving, Anne Kelson, Sister Anna Marie Mehigan, and Dawn Victor Prior to the time that Rev Stafford became the Director of Pastoral Care, Julie Blythe, a staff chaplain at St John's Hospital, told Hatmaker that Blythe was unimpressed and uncomfortable with Rev Stafford and surprised that he was part of Memorial's Pastoral Care staff *Id* , p 56-58 Julie Hoving was a staff chaplain at Memorial Hoving told Hatmaker that she did not find Rev Stafford helpful when she went

to him with problems and that she was not having her needs met in staff meetings *Id* , p 45-46

Anne Kelson, a per diem chaplain at Memorial, told Hatmaker that she was disappointed that Rev Stafford had been named Director, but did not elaborate as to her reasons for feeling this way *Hatmaker Dep* , p 63-64 Sister Anna Marie Mehigan, also a per diem chaplain at Memorial, told Hatmaker that she was "stunned" by an example relating to a restroom that Rev Stafford made during a discussion regarding teamwork *Id* , p 53-54 Sister Anna Marie told Hatmaker that Rev Stafford illustrated teamwork by noting that Rev Stafford, Memorial's CEO, and Memorial's vice president all used the same bathroom *Id* Sister Anna Marie reported this comment to Memorial administration, but did not feel that a resulting meeting on the issue went well *Id* , p 54 Dawn Victor, a hospice chaplain, told Hatmaker that she felt uncomfortable with Rev Stafford prior to Rev Hawkins' death because Rev Stafford would make comments making fun of or undermining Rev Hawkins *Id* , p 58-59 Victor did not give specifics of the comments, but told Hatmaker that she had informed Rev Stafford that she did not appreciate the way he was talking about Rev Hawkins *Id* , p 59-60

After reading Hatmaker's April 30, 2007, email, Hester directed Anita Lengacher, a Memorial employee relations specialist, to open an investigation to determine whether a hostile work environment toward women was present within the Pastoral Care Department On either April 30 or May 1, 2007,

Hester asked Hatmaker to discuss her concerns with Lengacher On April 30, 2007, Hester also informed Rev Stafford that Hatmaker had expressed concern about gender issues in the Pastoral Care Department and that he might be questioned by a member of Memorial's employee relations team That evening, Rev Stafford emailed Hester, noting that at Hester's request he was forwarding a copy of Hatmaker's congratulatory email dated March 30, 2007 *Motion for Summary Judgment*, Ex B, p 32-33 In his email, Rev Stafford characterized Hatmaker's comments as unfounded

In an email dated May 1, 2007, Hatmaker informed Hester that everything that she wanted to express had been contained in her previous letter and that he could forward the letter to Lengacher Hatmaker stated her opinion that it would be superfluous to give the matter any more time or attention Hatmaker noted that her ultimate desire was for Hester to provide highly focused oversight of Rev Stafford with respect to the issues that she raised Hester replied by email that he wanted Hatmaker to meet with Lengacher and then with him Hester characterized the matter as important

Hatmaker responded to Hester in another email, as follows

> Woody, thanks for considering my imput [sic] important However, without diminishing its value, I have already called Anita back with the same message I emailed to you If you and she consider it that important to meet

> face to face I am willing to do so, my main concern is about oversight
>
> As I age I realize that we all grow and change, my hope/concern is that Greg is on a path of insight that will not only help him professionally but for his own happiness That is where I would recommend that he have a spiritual director/counsellor [sic] to help him deal with the issues (in my opinion) that I reference When I was staff chaplain I had such a person in Ed Liddell to help me deal with my own shadow issues I wish that Greg had access to such spiritual mentorship as I did Perhaps Ed set such a high standard that I have problems accepting any less in a director Ultimately, at this point in time, I am concerned about [Pastoral Care] leadership at [Memorial] and how that translates for [Pastoral Care] staff I imagine Greg does very well with patients, families and male clergy, he is a very caring man My concern is about the bigger picture, especially as it concerns women

See Motion for Summary Judgment, Ex A, p 6-7, Request to Admit No 31, & Ex B, p 34 Hester responded by email that he understood, but wanted Hatmaker to meet with Lengacher and then with him Hester asked Hatmaker to arrange those meetings Hatmaker testified that she did not believe that Hester's email placed any burden on her to arrange a meeting with Hester She believed that, after she met with Lengacher, Hester would call her to set up a meeting *Hatmaker Dep* , p 84

On May 7, 2007, Hatmaker met with Lengacher for about an hour Lengacher prepared a written summary of the conversation *See Motion for Summary Judgment*, p 10-11, Statement of Undisputed Material Fact No 41, *Hatmaker's Opposition*, p 2 (conceding Defendant's Statement of Undisputed Material Fact No 41) Hatmaker examined the summary during her deposition and testified regarding it *Hatmaker Dep* , p 88-98 The following statements from Lengacher's summary were deemed to be accurate by Hatmaker Hatmaker felt that Rev Stafford had gender problems with women, specifically including problems putting down Rev Hawkins and an inherent sexist attitude due to the fact that he was a Southern Baptist and a part of a "good ole boys network" *Motion for Summary Judgment*, p 10, Statement of Undisputed Material Fact No 41, *Hatmaker Dep* , p 92 Hatmaker did not provide Lengacher with any examples of Rev Stafford treating her differently than anyone else in the Pastoral Care Department Hatmaker informed Lengacher that Julie Hoving was reluctant to interact with Rev Stafford due to Stafford's tendency to take center stage and tell the same stories over and over during conversations According to Hatmaker, Dawn Victor informed Hatmaker that Rev Stafford criticized Rev Hawkins and tried to include himself in lunches with other Pastoral Care employees Hatmaker also stated that Julie Blythe told Hatmaker that she felt his sexism the minute she met Rev Stafford Hatmaker reported that Rev Stafford put down women, but could not provide any examples of this Hatmaker

also commented on Rev Stafford's lack of public speaking sophistication, her concern about Rev Stafford working with the mostly female nurse population, and his sad history with women (i e , two divorces, mother committed suicide, and new boss Rev Hawkins passed away)

Hatmaker testified in her deposition that Lengacher's summary failed to reflect that four or five times during the conversation Hatmaker informed Lengacher that she was asking for oversight and not focusing on her interactions with Rev Stafford *Hatmaker Dep* , p 96-97 According to Hatmaker, Lengacher failed to note that Hatmaker mentioned Sister Anna Marie during the meeting Hatmaker also testified that she did not tell Lengacher that Rev Stafford needed psychotherapy to deal with women abandonment issues, but rather stated that, under similar circumstances she would seek therapy *Id* , p 97

Shortly after the meeting ended, Hatmaker emailed Lengacher to note that a rabbi and a priest were two of the clergy who "wrote raving reviews" for Rev Stafford *Motion for Summary Judgment*, Ex A, p 7, Request to Admit No 33, & Ex B, p 39 Hatmaker pointed out that these two men came from religions which exclude females from the clergy Hatmaker commented on the lack of female clergy participation during Rev Hawkins' memorial services Hatmaker also wrote that she was puzzled by the media's decision to interview black male clergy rather than black female clergy in connection with

recent gender issues Hatmaker noted "a not so subtle thread that continues to dismiss women regardless of color" *Motion for Summary Judgment*, Ex B, p 39 Lengacher forwarded a copy of this email to Hester

On May 10, 2007, Hatmaker and Rev Stafford attended a Grief Seminar sponsored by a local funeral home [5] Hatmaker spent about ten minutes introducing Rev Stafford to other individuals prior to the seminar According to Hatmaker, Rev Stafford did not want to engage in eye contact with her during this time Hatmaker also testified that Rev Stafford greeted the people that she introduced to him, but did not engage in conversations with them

At approximately 5 00 p m on May 10, 2007, Hatmaker emailed Rev Stafford She wrote that she was sensing increased distance between them and felt a wall building between them at the Grief Seminar Hatmaker stated that she wanted to address the issue before the wall became higher and asked if they could have a conversation Rev Stafford responded in an email dated May 11, 2007, stating that he would be willing to meet with Hatmaker

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[5] The Court notes that, while Hatmaker initially testified that the Grief Seminar occurred in early April 2007, she later clarified that the seminar was in May 2007 *Hatmaker Dep* , p 9-10, 20 Hatmaker also fails to dispute Memorial's Undisputed Material Fact No 46, which places the Grief Seminar on May 10, 2007 *Motion for Summary Judgment*, p 12, Statement of Undisputed Material Fact No 46, *Hatmaker's Opposition*, p 2 (conceding Defendant's Statement of Undisputed Material Fact No 46)

Meanwhile, Hester was reviewing the summary of Lengacher's interview with Hatmaker and Hatmaker's follow up email Hester testified that he concluded "that the perceived gender problem in the department was just that, a perceived gender problem that Janet held an opinion about and it was personal for her" *Motion for Summary Judgment*, Ex B, p 1-24, *Deposition of Forrest G Hester, III (Hester Dep)*, p 45 Hester clarified that it was clear to him that Hatmaker "perceived there were gender problems in the world that this was a concern that she held that transcended Memorial Health System and really [they] were dealing with a bigger issue here than Greg Stafford" *Id*

On May 10, 2007, Hester asked Lengacher to meet with Hatmaker and convey the following messages (1) after review, it was determined that there was not a hostile work environment/sexual harassment issue in the Pastoral Care Department, (2) Rev Stafford is the Director of the Department and if Hatmaker is uncomfortable working for him she should resign, (3) while Hatmaker is entitled to her opinions on gender conflicts in general, it is not appropriate to discuss these opinions in the workplace, and (4) Hatmaker should not attempt to represent concerns or opinions of others On May 11, 2007, Hatmaker and Lengacher met for about an hour and fifteen minutes Lengacher prepared a written summary of the conversation, which Hatmaker examined and testified regarding during her deposition

Hatmaker Dep , p 112-19, *Motion for Summary Judgment*, Ex C, p 53

Hatmaker testified that she informed Lengacher that she was asking for oversight of Rev Stafford and she found it undermining and punishing to be told that she should not do certain things Hatmaker concedes that Lengacher informed her that Rev Stafford had the full support of the administration and that, if Hatmaker is unable to support him, she should consider whether it is appropriate for her to continue working for Memorial Hatmaker testified that she expressed "concern over potential hostile work environment" and was "asking for oversight to prevent a hostile work environment" *Hatmaker Dep* , p 116 Hatmaker asserts that she assured Lengacher several times that she personally had no problems with Rev Stafford, because she did not see him at work, but that she was concerned about other women in the workplace *Id* , p 116-17 Hatmaker acknowledges that she was instructed to bring any future concerns to Lengacher and that discussing these concerns with anyone other than Lengacher would be considered inappropriate *Id* , p 117

The meeting ended affably, and Hatmaker viewed the matter to be concluded However, upon further reflection, Hatmaker deemed her concerns to be not properly heard and decided to write another email to Hester and Lengacher An accurate copy of that email, dated May 11, 2007 is included in the record *Motion for Summary Judgment*, Ex A, p 8, Request to Admit No 40, & Ex C, p 54 In the email,

Hatmaker reiterated that she was seeking increased oversight of Rev Stafford Hatmaker expressed sadness that her actions were perceived to be negative and undermining of Rev Stafford Hatmaker wrote "Since my communication with you was seemingly perceived as a reminder for me to be more positive and supportive of Greg's leadership rather than a helpful red flag for your monitoring purposes, I will direct further concerns and/or communications to Greg directly with hope that he will seek professional guidance" *Motion for Summary Judgment*, Ex C, p 54 Hatmaker stated that, in the past, she had encouraged women to talk directly with Hester or Stafford, but noted that her experience during the past week caused her to question this advice Hatmaker wrote that she felt like she "was being silenced, dismissed and encouraged to get with the program" *Id* Additionally, Hatmaker stated as follows

> [A]s I talk with Greg directly in the future, I would appreciate knowing what issues you have discussed with him, to which my name has been attached His increasing distance from me tells me that I am perceived by him as an unsafe person I am truly sad about this, given your assurance to me of confidentiality

Id

When Hester received Hatmaker's email, he was concerned about Hatmaker's continued questioning of Rev Stafford and her seeming inability to move on

He thought that Hatmaker might be unwilling to support the Pastoral Care Department or Rev Stafford As a result, Hester directed that Hatmaker not be scheduled to work for thirty days so that she could take time to consider her feelings and her position at Memorial Lengacher advised Hatmaker in a phone call on May 15, 2007, that she was being taken off the work schedule so that she could think through her feelings and consider whether she wanted to remain in the Department Lengacher asked Hatmaker to call her back in thirty days As a result of her removal from the work schedule for thirty days, Hatmaker lost four days of work

On or about June 15, 2008, Hatmaker called Lengacher and set up an appointment to come in and speak to her about her employment as chaplain On June 18, 2007, Hester called Hatmaker and advised her that Memorial had decided that she would not be scheduled for future shifts, ending Hatmaker's employment with Memorial Hester testified that he terminated Hatmaker's employment because he "had seen nothing that led [him] to believe that she had put her concerns behind her" and he "was of the opinion that her continued presence in the department would be disruptive " *Hester Dep* , p 70 Hester testified that he did not remember whether he reached this decision before he contacted Hatmaker or while he was talking with her on the phone Hester's testimony suggests that, at the time he called Hatmaker, she had not yet contacted Memorial, however, as previously noted, Memorial deems

undisputed the fact that Hatmaker contacted Lengacher on or about June 15, 2008, to set up a meeting According to Hatmaker, the day after she called Lengacher to schedule the appointment, Hester called her at home to tell her that her employment was terminated *Hatmaker Dep* , p 130-31 The instant litigation followed Memorial now seeks summary judgment on each of Hatmaker's claims

ANALYSIS

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law" Fed R Civ P 56(c) A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party" *Anderson v Liberty Lobby, Inc* , 477 U S 242, 248 (1986) The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact and that judgment as a matter of law is appropriate *Celotex Corp v Catrett*, 477 U S 317, 324 (1986) When a properly supported motion for summary judgment has been made, the party opposing summary judgment may not merely rest on the pleadings but must "set out specific facts showing a genuine issue for trial" Fed R Civ P 56(e)(2) "A party must present more than mere speculation or conjecture to defeat a summary judgment motion" *Liu v T & H Machine, Inc* , 191 F 3d 790, 796 (7th Cir 1999) The

Court must consider the evidence in the light most favorable to the non-moving party, here Hatmaker, and draw all reasonable inferences in her favor *See Anderson*, 477 U S at 255

Hatmaker's Complaint alleges that she experienced unlawful gender discrimination and that she was subjected to unlawful retaliation Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," based on the individual's gender 42 U S C § 2000e-2(a)(1) Title VII also contains a two clause antiretaliation provision, "making it 'an unlawful employment practice for an employer to discriminate against any of his employees [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter'" *Crawford v Metropolitan Government of Nashville and Davidson County*, 129 S Ct 846, 850 (2009) (*quoting* 42 U S C § 2000e-3(a)) The first clause is known as the "opposition clause," while the second is known as the "participation clause" *Id*

In her response to the pending Motion for Summary Judgment, Hatmaker concedes that Memorial is entitled to summary judgment on her substantive gender discrimination claim *Hatmaker's Opposition*, p 2, 14 Thus, the Motion for Summary Judgment is allowed as it relates to this claim, and the Court turns its attention to Hatmaker's claim of retaliation

A Title VII plaintiff may establish a prima facie case of retaliation, sufficient to overcome a motion for summary judgment, under either the direct method or the indirect method *Sitar v Indiana Dept of Transp*, 344 F3d 720 (7th Cir 2003) While Hatmaker briefly references the indirect method, she fails to develop her argument with respect to this approach Thus, any argument that Hatmaker could successfully establish a prima facie case under the indirect method is waived Moreover, even if preserved, Hatmaker's argument would fail because the record is devoid of evidence of a similarly situated employee who did not engage in protected conduct, a required element of a prima facie retaliation case under the indirect method *See Amrhein v Health Care Service Corp*, 546 F3d 854, 859 (7th Cir 2008)

Under the direct method, Hatmaker "must present direct evidence of (1) a statutorily protected activity, (2) an adverse action taken by the employer, and (3) a causal connection between the two" *Sitar*, 344 F3d at 728 Hatmaker can use either "direct evidence" or "circumstantial evidence" to show that her protected activity motivated Memorial's decisions to suspend her from work for thirty days and ultimately to terminate her employment *Amrhein*, 546 F3d at 858 The Seventh Circuit instructs as follows

> Direct evidence is evidence which (if believed by the trier of fact) will prove the fact in question without reliance upon inference or presumption, which typically involves an admission by the decision maker regarding

> the retaliatory intent Because direct evidence of discriminatory intent is rare, a plaintiff can also offer circumstantial evidence, which allows the trier of fact to infer intentional discrimination by the decisionmaker, typically through a longer chain of inferences

Id (internal quotations and citations omitted) Memorial asserts that summary judgment is appropriate because Hatmaker cannot establish that she engaged in statutorily protected activity or that a causal connection exists between her activity and the adverse employment actions

The Court begins with the first element – statutorily protected activity Hatmaker claims that her conduct satisfies both the opposition and participation clauses of 42 U S C § 2000e-3(a) The Court first analyzes whether Hatmaker has identified facts sufficient to support a finding that she opposed an unlawful employment practice under Title VII It is clear from the record that Hatmaker never complained that she had been personally sexually harassed by Rev Stafford However, Hatmaker argues that statements made in her April 30, 2007, email to Hester, in her May 7, 2007, email to Lengacher, in her May 11, 2007, email to Hester and Lengacher, and during her two interviews with Lengacher constitute opposition to gender discrimination

In the April 30, 2007, email, Hatmaker questioned Rev Stafford's leadership in relationship to women She informed Hester that several female

members of the clergy had expressed "discomfort" with Rev Stafford *Motion for Summary Judgment*, Ex A, p 14 Hatmaker expressed concern over the ways in which Rev Stafford's "seeming diminished view of same age or younger women" would affect staffing in the Pastoral Care Department *Id* She also expressed concern for Rev Hoving, Memorial's only female staff chaplain

Hester responded to the April 30, 2007, email by initiating a meeting between Hatmaker and Lengacher, which occurred on May 7, 2007 During that meeting, Lengacher questioned Hatmaker about the statements in her April 30, 2007, email, including the discomfort with Rev Stafford that female members of the clergy had expressed Hatmaker stated that Rev Hoving was reluctant to interact with Rev Stafford due to his tendency to take center stage and tell the same stories over and over Without providing details, Hatmaker stated that Blythe felt sexism the minute she met Rev Stafford Hatmaker also informed Lengacher, without providing specifics, that Rev Stafford put down women in general and Rev Hawkins particularly Hatmaker explained that, due to Rev Stafford's background, she was concerned about his diminished view of women in ministry Hatmaker also expressed an opinion that Rev Stafford had gender problems with women and an inherent sexist attitude due to the male dominated cultures with which he associates

In the April 30, 2007, email, Hatmaker questioned why women clergy were not included in Rev

Hawkins' memorial service and explained that Rev Stafford came from a religion that excluded women from the clergy She also referenced a then-current incident involving radio talk show host Don Imus and the Rutgers' women's basketball team as an example of a not so subtle threat that continues to dismiss women regardless of color

Lengacher and Hatmaker met again on May 11, 2007 In her deposition, Hatmaker testified as follows concerning this meeting "I did express concern over potential hostile work environment to her, no sexual harassment or sexual discrimination, but I did express to her that I had concerns, and that's why I was again asking for oversight to prevent a hostile work environment" *Hatmaker Dep*, p 116 Hatmaker concedes that she assured Lengacher several times that she personally had no problems with Rev Stafford, but that she was concerned about other women in the workplace *Id*, p 116-17 Hatmaker explained that she informed Lengacher that she "was trying to prevent any problems happening" *Id*, p 118

Finally, Hatmaker points to her May 11, 2007, email, specifically the following statement " the purpose of my recent letter was to express a concern related to Greg's interaction with women as well as faith traditions that exclude women from ordained ministry" *Motion for Summary Judgment*, Ex C, p 54 In that same email, however, Hatmaker clarifies that she "was asking for **oversight**," which she expressly describes as administrative monitoring of departmental interactions and hirings with the

awareness of "possible gender issues" *Id* (emphasis in original) Furthermore, Hatmaker testified in her deposition that the May 11, 2007, email was "not anything to do with Greg" but rather intended to express her disappointment in Lengacher's treatment of her during the Human Resources response to her complaint *Hatmaker Dep* , p 121

According to Memorial, Hatmaker at most opposed Rev Stafford's potential for gender discrimination The Court agrees The record is devoid of evidence that Hatmaker complained of any actual gender discrimination by Rev Stafford The Court is cognizant of the fact that Hatmaker does not need to prove that the underlying conduct, of which she complained, was actually serious enough to constitute a Title VII violation, but rather that, when instituting her complaint, she had a "sincere and reasonable belief" that she was opposing a practice which violated Title VII *Magyar v Saint Joseph Regional Medical Center*, 544 F 3d 766, 771 (7th Cir 2008) Under Seventh Circuit precedent, if an employee complains and the employer fires her because of the complaint, the retaliation claim could still be valid, even if the conduct complained of does not reach the level where it constitutes a violation of Title VII *See Hamner v St Vincent Hosp and Health Care Center, Inc* , 224 F 3d 701, 707 (7th Cir 2000) However, "the complaint must involve discrimination that is prohibited by Title VII" *Id*

It is clear from the record that Hatmaker did not believe she had been discriminated against by Rev

Stafford Furthermore, there is no evidence to support a finding that Hatmaker subjectively believed that others had been subjected to gender discrimination or a hostile work environment In her deposition, Hatmaker testified repeatedly that her purpose was to prevent these type of problems from happening *See e g , Hatmaker Dep* , p 116, 118 Viewed in the light most favorable to Hatmaker, the record reveals that Hatmaker sincerely believed that Rev Stafford had gender issues that could potentially cause a hostile work environment It is not reasonable, however, to believe that mere potential for gender discrimination violates Title VII "The objective reasonableness of the belief is not assessed by examining whether the conduct was persistent or severe enough to be unlawful, but merely whether it falls into the category of conduct prohibited by the statute " *Magyar*, 544 F 3d at 771 Title VII prohibits discrimination based on gender, not the potential for discrimination based on gender Thus, Hatmaker cannot establish that she had a sincere and reasonable belief that she was opposing a practice which violated Title VII in her interactions with Hester and Lengacher Hatmaker's conduct falls outside the opposition clause of 42 U S C § 2000e-3(a)

The participation clause of 42 U S C § 2000e-3(a) prohibits retaliation against an employee who has made a charge, testified, assisted, or participated in any manner in an investigation under Title VII Memorial asserts that Hatmaker's Complaint fails to allege a participation clause claim The Court agrees

The Complaint asserts that during 2007, Hatmaker repeatedly objected to what she perceived to be gender discrimination by Rev Stafford, by writing letters and meeting with representatives of Memorial *Complaint*, ¶ 6 According to the Complaint, "[a]s a result of Hatmaker's opposition to gender discrimination by her supervisor she was retaliated against" on three separate occasions *Id* , ¶ 7 Hatmaker alleges that she suffered adverse treatment, "in retaliation for [her] complaints of what she legitimately perceived to be gender discrimination by her supervisor" and, furthermore, that her employment "would not have been terminated had it not been for her vocal opposition to actions which she perceived as gender discrimination " *Id* , ¶¶ 8-9 This is the extent of the allegations relating to retaliation These allegations are insufficient to put Memorial on notice that Hatmaker intended to raise a participation clause claim in addition to an opposition clause claim The Seventh Circuit instructs that "a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment " *Grayson v O'Neill*, 308 F 3d 808, 817 (7th Cir 2002) Thus, the Court finds that Hatmaker waived this alternative basis for her retaliation claim

Moreover, even assuming it is properly alleged, Hatmaker's participation clause claim fails at summary judgment Undeniably, Hatmaker participated in Memorial's investigation of her complaints It is also undisputed that, after receiving Hatmaker's April 30, 2007, email, Hester directed Lengacher to

investigate whether a hostile work environment toward women existed in the Pastoral Care Department However, as set forth above, Hatmaker's complaints involved only the potential for discrimination, she did not allege that any actual Title VII violation had occurred The Seventh Circuit has determined that the good faith, reasonableness requirement extends to participation clause cases as well as those brought under the opposition clause *Mattson v Caterpillar, Inc* , 359 F 3d 885, 890-91 (7th Cir 2004) While Title VII protection is not lost simply because an employee is mistaken on the merits of her complaint, utterly baseless claims do not receive protection under Title VII *Id* at 890 This is not a case in which Hatmaker complained about discriminatory conduct that failed to rise to the level necessary to constitute a Title VII violation Hatmaker concedes that her purpose was to prevent gender discrimination from occurring in the Pastoral Care Department There is no evidence that any gender discrimination had occurred, nor did Hatmaker perceive that it had Thus, any claimed violation of Title VII would be completely baseless Although Hester directed an investigation to determine whether a hostile work environment existed, that investigation resulted from Hatmaker's complaints which involved conduct that fell outside of Title VII, both objectively and subjectively *See Howell v North Central College*, 331 F Supp 2d 660, 664-65 (N D Ill 2004) (rejecting the argument that an underlying harassment claim that is objectively groundless, such as a sexual orientation claim under Title VII, can provide the basis for a

retaliation claim) Given the unique, undisputed facts of the instant case, the Court finds that Hatmaker's conduct is not entitled to protection under the participation clause of Title VII

Because the evidence, viewed in the light most favorable to Hatmaker, is insufficient to establish that Hatmaker engaged in statutorily protected activity, the Court need not address the causal connection prong Memorial is entitled to summary judgment on Hatmaker's Title VII retaliation claim

CONCLUSION

For the reasons set forth above, Defendant Memorial Medical Center's Motion for Summary Judgment (d/e 19) is ALLOWED Judgment is entered in favor of Memorial Medical Center and against Plaintiff Janet Hatmaker on all claims All pending motions are denied as moot This case is closed

IT IS THEREFORE SO ORDERED

ENTER July 31, 2009

FOR THE COURT

/s/ Jeanne E Scott
JEANNE E SCOTT
UNITED STATES
DISTRICT JUDGE

AO 450 (Rev 5/85) Judgment in a Civil Case

United States District Court

CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

(Filed Jul 31, 2009)

JANET HATMAKER

vs

MEMORIAL HEALTH SYSTEM and MEMORIAL MEDICAL CENTER

Case Number
07-3319

☐ **JURY VERDICT.** This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict

XX **DECISION BY THE COURT.** This action came to trial or hearing before the Court The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED, pursuant to an Opinion entered by the Honorable Jeanne E Scott on 07/31/2009, the Defendant Memorial Medical Center's Motion for Summary Judgment (d/e 19) is ALLOWED Judgment is entered in favor of Memorial Medical Center and against Plaintiff Janet Hatmaker on all claims All pending motions are denied as moot This case is close ----------

On 03/14/2008, Defendant Memorial Health System was terminated pursuant to a Stipulation of Dismissal allowed by Text Order entered by Magistrate Judge Byron Cudmore ----------

ENTER this 31st day of July, 2009

s/ Pamela E Robinson
PAMELA E ROBINSON, CLERK

s/ D Meadows
BY DEPUTY CLERK

(2)

No. 10-724

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

JANET HATMAKER,

Petitioner,

v.

MEMORIAL MEDICAL CENTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "participation" clause of the anti-retaliation provision of Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-3(a), protect a worker who prior to her dismissal from employment had not filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission, or otherwise testified, assisted, or participated in any manner in any proceeding or hearing triggered by the filing of a Charge of Discrimination with the U.S. E.E.O.C., had not indicated any intention to file a Charge of Discrimination with the U.S. E.E.O.C., and whose pre-dismissal reports to her employer did not claim the existence of any gender based discrimination in her workplace?

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Memorial Medical Center, is an Illinois not-for-profit corporation, wholly owned by Memorial Health System, an Illinois not-for-profit corporation. Neither corporation identified herein is a subsidiary or an affiliate of a publicly held company. No publicly held company owns 10% or more of the membership interests of Memorial Medical Center or Memorial Health System.

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STATEMENT OF THE CASE

In its August 30, 2010, Opinion, the Seventh Circuit describes the Petitioner, Janet Hatmaker, as a "busy-body" with a "preoccupation with superficial characteristics of her new boss [Rev. Greg Stafford]" who exercised bad judgment, harped on irrelevant but sensitive issues of religion and race and who in fact admits that she had no evidence that her boss had engaged in any discriminatory conduct. (App. pg. 12, 7, 10, 13). The Seventh Circuit thus, like the U.S. District Court before it, found her employer, Memorial Medical Center (hereinafter "Memorial") to be entitled to a summary judgment when Hatmaker claimed that her discharge from Memorial's employment was due to her "participation" in an internal investigation within the scope of Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a). The Statement of the Case provided to this Court by Hatmaker presents herself in a far more noble light. However, Hatmaker can only achieve that standing by selectively pulling isolated facts from the record, ignoring relevant evidence, and unfortunately at times misrepresenting the record as explained below.

Hatmaker begins by representing herself as "the most senior member of [Memorial's] chaplain staff." (Petition, pg. 4). That is not accurate. Hatmaker had in fact retired from Memorial's full-time chaplain staff in 2001 and at the times relevant to this dispute served it only on a *per diem* basis working only two to four night shifts during the course of a month. She admits that as a result she very seldom ever saw or

interacted with Stafford, but yet felt fully competent to comment as to Stafford's ability to direct Memorial's chaplain department.

While Hatmaker did communicate with Stafford's boss, Woody Hester, on February 25, 2007, and March 6, 2007, about Stafford's candidacy for chaplain department director, her concerns at that time were simply her belief that Stafford was not an effective public speaker, that he seemed to major in small talk, and sacrificed dignity and leadership in exchange for popularity. Nowhere in those communications did she directly accuse Stafford of being "not professional" as she now alleges in her Petition (Petition, pg. 4) or otherwise having any issues with women.

Hatmaker also overstates the nature and extent of the communications she had with others following Stafford's appointment as director of the chaplain department in late March of 2007. Hatmaker did not testify that Rev. Julie Hoving felt that *staff* concerns about Stafford had been ignored by Hester. (Petition, pg. 5). She only testified that Hoving was disappointed that nobody asked Hoving for her own opinion about Stafford during the selection process. Hatmaker alleges that Hoving would have shared that Hoving did not find Stafford to be helpful when Hoving brought problems to him to help solve but did not know why Hoving held this belief. Hatmaker's Petition goes on to represent that two other women, Julie Blythe and Dawn Victor, were female members of Memorial's chaplain staff with concerns about Stafford. They, however, were not on Memorial's

chaplain staff and provided to Hatmaker no specific examples of why they did not like Stafford. Thus, the "significant number of women on staff" with concerns about Stafford identified by Hatmaker in her Petition were only three in number – Hatmaker, Hoving, and Sister Mehigan (who did not like Stafford's one-time use of a restroom analogy to make a point about team work). (Petition, pg. 6).

Based on the identified isolated and vague comments of these individuals, as well as her own occasional interactions with Stafford, Hatmaker on April 30, 2007, drafted an email to Hester questioning for the first time Stafford's "leadership in relationship to women." This led to her being interviewed by MMC human resources staff member, Anita Lengacher, on May 7, 2007, to determine if there was any substance to her statement about Stafford's ability to interact with women. There was not.

At her deposition, Hatmaker admitted that Lengacher correctly summarized their May 7 discussion as one in which Hatmaker confessed that Stafford had never treated Hatmaker in a sexist fashion or differently than anyone else in the department. Rather than accusing Stafford of having a "diminished view of women in ministry" as alleged in the Petition (Petition, pg. 11), Hatmaker only speculated that since Stafford was a Southern Baptist, that he might be influenced by what she believed to be Southern Baptist "traditions" about women in the ministry. Moreover, Hatmaker did not relate that another pastor accused Stafford of *creating* a "good

ole boys network" (Petition, pg. 11), but only that a pastor said in passing and without explanation that "it feels like a good ole boys network."

Lengacher prepared a memo summarizing her May 7, 2007, meeting with Hatmaker and provided that memo to Hester. In quoting from that memo on page 11-12 of her Petition, Hatmaker omits several essential portions. For instance, Hatmaker selectively omits that Lengacher also reported to Hester that Hatmaker was unable to verbalize any specific examples of any disparate treatment engaged in by Stafford or otherwise support the comment that Stafford "puts down women." Also omitted was Lengacher's statement that Hatmaker said that Stafford had many strong points including his sense of humor, presentation of himself, and his compassion toward others.

Hatmaker's Petition goes on to mischaracterize her May 7 email to Lengacher that followed the May 7 meeting described above. Contrary to her Petition's description (Petition, pg. 12), Hatmaker did not express a concern that women were excluded from the prior chaplain department's director's memorial service, but rather only that a Jewish Rabbi and Catholic priest were asked to present prayers and readings at that event, rather than female clergy. Her May 7 email also made no mention of Rev. Stafford's having come from "a tradition that excluded women from the clergy." (Petition, pg. 12).

Given that Hatmaker had brought nothing but unsupported concerns to Lengacher's attention, Hester instructed Lengacher to provide guidance to Hatmaker as to Memorial's expectations going forward. This was done on May 11, 2007. Hatmaker once again provides only a selectively edited version of the meeting at which that occurred. (Petition, pg. 14). Hatmaker was instructed at that meeting not to engage in gossip about Stafford or to speculate that Stafford needed counseling. Hatmaker was advised that the need for her to consider whether she could continue at Memorial would only be triggered by a decision on Hatmaker's part that she could not be supportive of Stafford's leadership of the chaplain department. Hatmaker described this meeting as ending "affably" and that she viewed this meeting to be the end of her interaction with Memorial on this topic.

But Hatmaker had to have the last word. On May 11, 2007, after leaving her meeting with Lengacher, Hatmaker sent one more email to Hester and Lengacher to which Hatmaker gives remarkably little attention in her Petition on pages 14-15. This is surprising as it was this email that ultimately triggered the events that led to the loss of her employment. In that email Hatmaker expressed that (even though she had no support for such a position) she hoped that Memorial would continue to be sensitive to possible gender issues surrounding Stafford because of his Southern Baptist faith (thereby ignoring Memorial's conclusion that she had brought forth no

reason to be so concerned). She also stated her intention to direct her concerns to Stafford directly "with hope that he will seek professional guidance" (thus also evidencing that she was still stuck on the belief that Stafford needed counseling). She added that she also now "questioned" whether encouraging women to speak to Hester or Stafford about workplace concerns was the right thing to do. (See App. pg. 31-32 for additional description of this email.)

Hatmaker clearly and firmly assigned Stafford a status in her own mind without a reason to do so ("trafficking in stereotypes," in the words of the Seventh Circuit, App. pg. 10), and now appeared to be forming one about Memorial's Human Resources Department as well. When Hatmaker did nothing during a 30-day leave period to convince Memorial to the contrary, her *per diem* employment was ended in June 2007.

With Hatmaker's Statement of the Case now corrected, the Court can properly evaluate the merits of Hatmaker's Petition.

REASONS FOR DENYING WRIT

I. This Case is Not the Vehicle Needed to Address any Issue Left Unresolved by the Supreme Court in *Crawford v. Metro. Gov't of Nashville & Davidson County*

Hatmaker begins her Petition by suggesting that this Court left open a needed interpretation of Section

704(a) of Title VII of 1964 Civil Rights Act, 42 U.S.C. §2000e-3(a), when this Court decided the case of *Crawford v. Metro. Gov't of Nashville & Davidson County*, 552 U.S. 1162, 129 S. Ct. 846 (2008) and invites this Court to use her case as a vehicle to address that void. (Petition, pg. 2). Specifically, Hatmaker claims that this Court needs to decide whether the "participation clause" of Section 704(a) extends to offer protection to one who is compelled to "participate in a purely internal investigation." (Petition, pg. 17). To the extent this issue needs to be addressed at all, this case is not the vehicle by which to do so because Hatmaker did not in fact participate in an investigation and brought forth no issue that Title VII was designed to address.

Memorial's May 7, 2007, interview of Hatmaker was not an internal investigation of alleged discriminatory practices protected by Title VII. It was instead no more than a preliminary inquiry to determine what if anything Hatmaker was alleging in her April 30 email. When Hatmaker herself made clear that she was bringing forth no allegation of actual gender specific misconduct engaged in by Stafford, and instead appeared focused on her own prejudicial view of certain religious denominations, the preliminary inquiry ended. Even the EEOC's broad reading of Section 704(a)'s participation clause (See Petition, pg. 20) requires the participant to verbalize "alleged discriminatory practices." Since Hatmaker affirmatively denied that Stafford engaged in any such practices, her case does not provide a vehicle to

re-examine a clause designed to protect individuals who participate in internal investigations where discriminatory practices are actually alleged.

In support of her position Hatmaker identifies selected provisions of the U.S. Equal Employment Opportunity Commission's Compliance Manual which opine that those who cooperate with internal workplace investigations of unlawful discrimination are opposing practices made unlawful by Title VII. (Petition, pg. 19-20). These individuals are thus protected by Section 704(a)'s "opposition" clause in the opinion of the EEOC. In this Court's opinion in *Crawford*, this Court agreed that one who speaks out about discrimination in answer to questions from her employer in an internal investigation obtains opposition clause protection. *Crawford*, 129 S. Ct. at 849. The mechanism needed to protect employees who respond to workplace inquiries about matters addressed by Title VII has thus already been identified by this Court: Section 704(a)'s opposition clause.

Hatmaker is unable to cloak herself in the opposition clause's protection, however, because she, by her own admission, has brought forth nothing that Title VII seeks to prohibit. She only brought forth certain unsubstantiated and prejudiced concerns about her boss's ability to interact with women and argues that because her employer's human resource professionals heard her out rather than ignoring her altogether that she gains standing to claim protection by Section 704(a)'s participation clause as one who participated in an internal investigation. Hatmaker

thus is not asking this Court to interpret the "participation clause." She is asking this Court to re-write it – a task better left to Congress if such a need exists.

II. There is No Conflict Amongst the Circuits as to the Scope of the Participation Clause

In holding that Section 704(a)'s participation clause was only designed by Congress to protect participation in official investigations and related proceedings initiated by the filing of a Charge of Discrimination with the EEOC, the Seventh Circuit noted that it was interpreting Section 704(a) in the same manner as the Eighth Circuit (*Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999)) and the Eleventh Circuit (*EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)).

The Seventh Circuit could have added that its holding was in line with decisions rendered by the Fifth Circuit (*Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000)), the Sixth Circuit (*Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)), and the Tenth Circuit (*Archuleta v. Colorado Dept. of Institutions, Div. of Youth Services*, 936 F.3d 483, 487 (10th Cir. 1991)), all of which recite that participation clause protection is dependent upon initiation of EEOC proceedings.

The only place one can discern even a whiff of conflict is within the Ninth Circuit which in 1990 rendered an opinion consistent with the Seventh

Circuit's disposition of this case (*Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990)) and subsequently rendered one which took a contrary position (*Hashimoto v. Dalton*, 118 F.3d 671, 679-80 (9th Cir. 1997)). In rendering its decision in *Hashimoto* the Ninth Circuit did not mention its earlier *Vasconcelos* opinion and no Circuit Court has interpreted *Hashimoto* as overruling *Vasconcelos*. Thus at most, the Ninth Circuit has an issue internal to itself to resolve before it can be said that the Ninth Circuit has weighed in on an issue contrary to the position taken by *every other Circuit* that has had occasion to address it.[1]

The reason for this unanimity is simple. Section 704(a) of Title VII specifically provides that protection only extends to those who have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter*. 42 U.S.C. §2000e-3(a) (emphasis added). Title VII does not require that employers perform internal investigations to look into any unsupported concern of any employee. Thus internal investigations in the absence of the filing of any

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[1] Two recent U.S. District Court cases from the Ninth Circuit quote from *Vasconcelos* and not *Hashimoto* thus suggesting that *Hashimoto* is not being looked to for guidance even within the Ninth Circuit on this issue. *Rucker v. Vilsack*, 2010 U.S. Dist. LEXIS 37994 (D. OR 2010); *Snider v. Greater Nevada LLC*, 2009 U.S. Dist. LEXIS 95749 (D. NV 2009).

Charge of Discrimination are not proceedings "under this subchapter."

Finally the *Scott* and *Evans* cases cited by Hatmaker as further evidence of inconsistency within the Circuits do not stand for the proposition for which they are presented. (Petition, pg. 21-22). In *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), the issue of whether or not the plaintiff's participation in an internal sexual harassment investigation triggered participation clause protection was not made an issue for decision in that case. In *Evans v. City of Houston*, 246 F.3d 344, 352, n.7 (5th Cir. 2001), the Fifth Circuit noted in a footnote that the issue of whether or not the plaintiff's participation in internal grievance procedures was protected conduct was not ripe for argument due to an earlier request for admission response made during discovery proceedings in the case. In any event, in light of the decisions reached by the Eighth and Fifth Circuits in *Brower* and *Byers* respectively, those Circuits are already on record as having issued decisions on the merits which are consistent with the decision reached by the Seventh Circuit in *Hatmaker*. There thus is no conflict in the Circuits ripe for resolution by the Supreme Court under the facts presented in this case.

III. Inasmuch as Hatmaker has no Standing to Claim Participation Clause Protection, That Which She Said to Memorial Does Not Merit Review by This Court

Hatmaker's final argument is that her case merits review because of the Seventh Circuit's alternative grounds for affirming the summary dismissal of her case, namely a decision based on a review of the evidence in the record that Hatmaker had not engaged in conduct triggering Title VII protection. (Petition, pg. 22, App.7). Hatmaker characterizes the Seventh Circuit as holding that Hatmaker engaged in "bad judgment" and then adds her own words "during the course of an investigation." (Petition, pg. 23). This, however, is a clear misreading of the Seventh Circuit's holding. The "bad judgment" engaged in by Hatmaker was her May 11 email issued *after* she agreed that Memorial's inquiry into her concerns had ended. Thus this case does not call for an interpretation of comments Hatmaker made during the course of Title VII proceedings, as was at issue in *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411 (4th Cir. 1999). Any split in authority as to what can be made of comments uttered during the course of a legitimate Title VII investigation will need to await a vehicle that can properly transport those concerns to this Court.

In any event, given that the record and law are clear that Hatmaker had not triggered participation clause protection because of her failure to institute Title VII proceedings, there is no need for this Court

to even consider reviewing this alternative ground for affirming the decision of the U.S. District Court.

CONCLUSION

Hatmaker's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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